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In The

Supreme Court of the United States

JOSEPH JESNER, et al.,

Petitioners,

v.

ARAB BANK, PLC,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF FORMER U.S. COUNTERTERRORISM AND NATIONAL SECURITY OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Alien Tort Statute, 28 U.S.C. § 1350, categorically forecloses corporate liability.

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BRIEF OF FORMER U.S. COUNTERTERRORISM AND NATIONAL SECURITY OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*[1]

Amici are former U.S. officials who have exercised responsibilities in the areas of counterterrorism, diplomacy, and national security, seeking to enforce the

[1] This brief is filed with the written consent of all parties through universal letters of consent on file with the Clerk. No counsel for either party authored this brief in whole or in part, and no person or entity other than the *amici* or their counsel made a monetary contribution to the brief's preparation or submission.

universal norms of civilized nations that prohibit heinous acts of terrorism. As the laws that *amici* helped to create and strove to enforce recognize, stopping the flow of funds to terrorist networks helps save lives.

In *amici's* view, deliberate corporate misfeasance—such as the knowing and intentional financing of terrorism at issue here—violates the law of nations. This understanding underpins the global consensus behind international cooperative efforts to disrupt and deter terrorist financing networks. *Amici's* experience working to further this international effort also confirms that civil remedies are necessary adjuncts to resource-constrained government enforcement efforts in the fight to eradicate international terrorist financing, and that restricting such remedies to American nationals will jeopardize global cooperation in the fight against terrorism. Only by engaging every possible enforcement tool can the entities that facilitate terrorism be exposed to the world, forcing terrorists to route their funds through ever more complicated and less secure means and, ultimately, reducing their capacity to conduct attacks. The per se exclusion of corporations and other business entities from the reach of the Alien Tort Statute is not only inconsistent with the text and history of the statute, it would undermine current efforts to successfully combat international terrorism.

Biographical information for each signatory to this brief is provided in the appendix.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The global effort to prevent terrorist attacks—and save lives—depends upon the success of domestic and international efforts to cut off funding to terrorist groups. This is an all-hands-on-deck effort, requiring the use of every possible mechanism to identify, punish, and deter all persons and entities that knowingly provide funds and financial services to terrorists—many of which are often charities, businesses, banks, or other organizations using the corporate form.

Amici have decades of experience developing and enforcing international and national prohibitions on providing funds and financial support to terrorists. This experience teaches that the Alien Tort Statute (ATS) provides an important weapon in the United States' arsenal against terrorist financing. It would make little sense to disable it by removing from the statute's reach the very targets where it can achieve the greatest effect—the asset-rich legal entities from which, and through which, most terrorist funding flows. Independent of the happenstance of the victims' nationality, entities that choose to avail themselves of the advantages of U.S. currency and U.S. financial systems must be held accountable in U.S. courts when they provide financial support to terrorism.

A network of treaties, United Nations Security Council resolutions, and other multilateral agreements prohibits corporations and other entities from

providing funds or financial services to designated terrorist groups or in support of specific terrorist acts. Congress, acting under its authority to define offenses against the law of nations, has likewise prohibited material support to terrorism. That prohibition is part of a domestic enforcement regime that includes civil remedies for Americans harmed by terrorist attacks abroad. Congress created that cause of action to fill a gap, realizing that non-Americans already had remedies against terrorist actors under the ATS.

This Nation's counterterrorism efforts are significantly strengthened when corporations can be subject to civil liability for the kind of deliberate corporate support for terrorist operations at issue in this case. Corporate entities, including charities, banks, and other businesses, are key links in terrorist financing networks. Only the threat of large civil judgments and the additional enforcement provided by litigants as private attorneys general can achieve maximum deterrence of the knowing provision of financial support to terrorists—forcing terrorists to use other, more difficult methods to move money around the world, reducing their access to funds, and ultimately saving lives.

The United States' national security interests would be disserved by permitting corporate immunity for funding terrorist acts—especially through the use of U.S. financial systems—simply because such attacks happen to leave Americans uninjured. Terrorism is a global threat, and can be addressed only through global cooperation. Creating a liability loophole for corporations will strain relations with American allies

and undercut U.S. leadership in the global effort to shut down terrorists' access to funds. The end result of such corporate immunity would be less deterrence, easier movement of money to terrorist organizations, more attacks, and the loss of innocent lives. That does not make Americans safer. Corporations that knowingly provide funds or financial services to terrorist organizations should be subject to liability under the ATS.

ARGUMENT

I. A Comprehensive International Regime Subjects Corporations To Liability For Knowing Financial Support To Terrorism.

"Deeply concerned about the worldwide escalation of acts of terrorism in all its forms and manifestations," the United States and 187 other nations have concluded that "the financing of terrorism is a matter of grave concern to the international community as a whole." International Convention for the Suppression of the Financing of Terrorism, Preamble, Dec. 9, 1999, 2178 U.N.T.S. 229 ("Terrorist Financing Convention").[2] The Terrorist Financing Convention expresses a global consensus that "the number and seriousness of acts of international terrorism depend on the financing that

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[2] United Nations, Multilateral Treaties Deposited with the Secretary-General, Status of Treaties, Chapter XVIII, Penal Matters, § 11, *available at* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-11&chapter =18&clang=_en.

terrorists may obtain," and proclaims an "urgent need to devis[e] and adopt[] effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators." *Id.*

The international community thus agrees that to prevent and deter terrorist attacks, financial support to terrorist networks must be shut down. To that end, international law makes it illegal for anyone—natural persons, unincorporated groups, or corporate entities alike—to provide knowing or deliberate financial support to specific, proscribed terrorist acts or to designated terrorist groups, or to participate as an accomplice to such provision of funds. Civil liability under the ATS is an essential component of this comprehensive global effort to stop the provision of financial support to terrorism, in any form—corporate or otherwise.

This international consensus that the flow of money to terrorists must be stopped is also echoed in Congress's policy choices and reinforced by domestic measures. *See, e.g.*, S. Rep. No. 102-342, at 22 (1992) (Conf. Rep.) (stating, about the Anti-Terrorism Act, that the "imposition of liability at any point along the causal chain of terrorism . . . would interrupt, or at least imperil, the flow of money"). Congress has long recognized that these domestic measures reflect the law of nations and help to fulfill the United States' obligation to penalize financial support to terrorists. Congress has likewise recognized that the ATS is a key

component of this domestic legal framework imposing liability for terrorists and their supporters.

A. The Terrorist Financing Convention, Multiple Security Council Resolutions, and Numerous Other International Agreements Prohibit Corporate Financial Support of Terrorism.

Terrorists are the modern-day equivalent to pirates, recognized across the globe as enemies of all humanity. *See, e.g.*, S.C. Res. 1368, ¶ 1 (Sept. 12, 2001) ("[A]ny act of international terrorism [is] a threat to international peace and security."). A network of international treaties, agreements, and Security Council resolutions seeks to identify and penalize the persons—including entities—that knowingly enable the flow of funds to terrorists. These international agreements establish that terrorists' corporate financiers, too, are treated as global enemies, subject to sanction by international law—and therefore to liability as "enem[ies] of all mankind" under the Alien Tort Statute, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (quotation marks and citation omitted).

1. The centerpiece of the international effort to stop terrorist funding is the Terrorist Financing Convention. 2178 U.N.T.S. 229; *see* Pet. Br. at 32-33.

The Convention prohibits any person from "directly or indirectly, unlawfully and willfully, provid[ing] or collect[ing] funds with the intention that they should be used or in the knowledge that they are to

be used, in full or in part, in order to carry out" an act that violates one of nine separate international conventions prohibiting particular terrorist acts, or "[a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act." Terrorist Financing Convention, art. 2(1). The cross-referenced treaties include, *inter alia*, the Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; the International Convention against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205; and the International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 284. Terrorist Financing Convention, Annex. A person can violate the Convention not only by engaging in primary conduct, but also by "[p]articipat[ing] as an accomplice in an offence." *Id.* art. 2(5)(a).

The Terrorist Financing Convention explicitly provides that entities can be liable for the offenses that it creates. It requires that "[e]ach State party . . . shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence. . . . Such liability may be criminal, civil or administrative." *Id.* art. 5(1). It further provides that state parties must "ensure, in

particular, that legal entities . . . are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions," including "monetary sanctions." *Id.* art. 5(3). Finally, the Convention compels its signatories to adopt domestic measures "to prohibit in their territories illegal activities of persons *and organizations* that knowingly encourage, instigate, organize or engage in the commission of offences set forth in article 2." *Id.* art. 18(1)(a) (emphasis added).

2. The Convention's strictures have been reinforced by a series of Security Council resolutions that have created a global designation regime to identify and freeze the assets of persons and entities that enable the flow of funds to terrorists. These resolutions aim to prevent terrorist attacks by depriving terrorist organizations of assets. By naming and penalizing the relevant actors, they also make plain that both individuals and legal entities are subject to international punishment when they knowingly provide financial support to terrorism.

Security Council Resolution 1267, addressed to terrorist activity facilitated by the Taliban, required all nations to "[f]reeze funds and other financial resources . . . owned or controlled directly or indirectly by the Taliban . . . as designated by" a committee created by the resolution (the "1267 Committee"), and "ensure that neither they nor any other funds or financial resources so designated are made available . . . to or for the benefit of the Taliban." S.C. Res. 1267, ¶ 4(b) (Oct. 15, 1999). The responsibility of the 1267 Committee

was extended to assets held by persons or entities supporting Usama bin Laden and Al-Qaida in a subsequent resolution, S.C. Res. 1333, ¶ 8(c) (Dec. 19, 2000), and then to individuals and entities supporting the Islamic State of Iraq and the Levant (ISIL), S.C. Res. 2253, ¶ 2(a) (Dec. 17, 2015). The resolutions specify that "an individual, group, undertaking *or entity*" can be designated and subject to sanctions for, *inter alia*, "participating in the financing . . . of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of" the relevant terrorist organization. S.C. Res. 1989, ¶ 4(a) (June 17, 2011) (emphasis added).[3] The 1267 Committee even provides separate forms for listing requests related to individuals, groups, and entities/undertakings. United Nations, ISIL (Da'esh) & Al-Qaida Sanctions Committee, Sanctions List Materials.[4]

Consistent with these resolutions, the 1267 Committee maintains a published list of individuals and entities that have been designated as supporting Al-Qaida or ISIL and are therefore subject to international sanctions. Seventy-five entities are presently on the list, including armed groups but also corporations, charities, and foundations, such as the Benevolence International Foundation (a non-profit corporation

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[3] In 2011, the Security Council began to keep two separate sanctions lists, one covering the Taliban and associated entities and one covering Al-Qaida and associated entities (including, after 2015, ISIL). S.C. Res. 1989, ¶ 2.

[4] *Available at* https://www.un.org/sc/suborg/en/sanctions/1267/aq_sanctions_list.

incorporated in Illinois), the Al Rashid and Rabita Trusts, the Global Relief Foundation, and many others. United Nations, ISIL (Da'esh) & Al-Qaida Sanctions Committee, Sanctions List Materials, Narrative Summary of Reasons for Listing, Type: Entity (June 7, 2017).[5]

The Security Council sanctions regime depends upon member states "identifying and nominating for listing additional individuals, groups, undertakings, and entities which should be subject to" sanctions. *See, e.g.*, S.C. Res. 2253, Preamble. The designation regime adopted by the Security Council thus works in conjunction with an interlocking effort in the United States to designate individuals and entities as Specially Designated Global Terrorists, thereby freezing their U.S.-based assets and generally prohibiting transactions between U.S. persons and the designated persons and entities. Exec. Order No. 13224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

As under the Security Council designation regime, both entities and individuals can be designated by the United States as Specially Designated Global Terrorists. *Id.* § 3(a) (defining "person" to mean "an individual or entity"). Entities can be designated, *inter alia*, by the Secretary of Treasury, in consultation with the Secretary of State and Attorney General, if they "provide financial, material, or technological support for, or financial or other services to or in support of, . . . acts

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[5] *Available at* https://www.un.org/sc/suborg/en/sanctions/1267/aq_sanctions_list/summaries.

of terrorism" or designated individuals or entities. *Id.* § 1(d)(i).

Like the 1267 Committee's sanctions list, the sanctions list under Executive Order 13224 is replete with juridical entities. There are nearly 300 entities designated as Specially Designated Global Terrorists.[6] They include banks (*e.g.*, Al-Aqsa Islamic Bank), charities (*e.g.*, Holy Land Foundation for Relief and Development, Goodwill Charitable Organization, Inc.), trusts (*e.g.*, Al-Akhtar Trust International, Al Rehmat Trust), and ostensibly legitimate businesses (*e.g.*, Barakaat North America, Inc., Al-Hamati Sweets Bakeries, Unique Stars Mobile Phones LLC, Al-Naser Airlines).

The relevant Security Council resolutions require member states to do more than impose sanctions on designated entities to suppress terrorist financing. Specifically, Security Council Resolution 1373, adopted shortly after the September 11 attacks, requires member states to "[p]revent and suppress the financing of terrorist acts." S.C. Res. 1373, ¶ 1(a) (Sept. 28, 2001). Member states must "[p]rohibit . . . entities within their territories from making any funds, financial assets or economic resources or financial or related services available, directly or indirectly," for the benefit of persons who commit terrorist acts or entities acting on behalf of such persons. *Id.* ¶ 1(d). Resolution 1373

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[6] *See* Office of Foreign Assets Control, Dep't of Treasury, Sanctions List Search, https://sanctionssearch.ofac.treas.gov/ (select type "entity" and program code "SDGT").

reinforces the prohibitions adopted in the Terrorist Financing Convention, and—like the Convention—specifically recognizes that entities are subject to liability under international law when they make funds or financial services available to terrorists.

3. Beyond the Terrorist Financing Convention and Security Council resolutions, the international consensus prohibiting the provision of financial support to terrorism has been oft- and recently reiterated by other multilateral agreements and intergovernmental organizations. For example, the Financial Action Task Force on Money Laundering (FATF), established at the G-7 summit in 1989, now has a membership of 35 nations and two regional organizations (the European Commission and Gulf Cooperation Council), representing the world's major financial centers.[7] In 2001, the members of the FATF added "the development of standards in the fight against terrorist financing" to its mission.[8] Those standards expressly recognized that "entities . . . can be abused for the financing of terrorism" and "[n]on-profit organisations are particularly vulnerable." FATF, IX SPECIAL RECOMMENDATIONS 3 (2001).[9]

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[7] *See* FATF, History of the FATF, http://www.fatf-gafi.org/about/historyofthefatf/; FATF, Members and Observers, http://www.fatf-gafi.org/about/membersandobservers/.

[8] FATF, History of the FATF http://www.fatf-gafi.org/about/historyofthefatf/.

[9] *Available at* http://www.fatf-gafi.org/publications/fatfrecommendations/documents/ixspecialrecommendations.html.

And as recently as May 2017, the President signed a Memorandum of Understanding with the Gulf Cooperation Council member nations, including Saudi Arabia, to establish the Terrorist Financing Targeting Center, with the intent to "coordinate sanctions and other disruptive actions against terrorist finance networks." Press Release, Dep't of Treasury, U.S. and Saudi Arabia to Co-Chair New Terrorist Financing Targeting Center (May 21, 2017).[10]

4. Taken together, these international agreements demonstrate that "international law extends the scope of liability for" knowingly providing funds or financial services to terrorists "to the perpetrator being sued" here—*i.e.*, private actors, including corporations. *Sosa*, 542 U.S. at 732 n.20. Both the Terrorist Financing Convention and Security Council Resolution 1373 *require* member states to impose liability on entities that participate in the knowing financial support of terrorism. The Terrorist Financing Convention requires nations to impose "criminal, civil or administrative" liability that is "effective, proportionate and dissuasive" on "*a legal entity located in its territory* or organized under its laws," when that entity's officers knowingly provide funds to terrorists or are accomplices to such provision of funds. Art. 5(1), (3) (emphasis added). Security Council Resolution 1373 adds that nations must "[p]rohibit . . . *entities* within their territories from making any funds . . . or financial or related services available" to terrorists. S.C. Res. 1373,

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[10] *Available at* https://www.treasury.gov/press-center/press-releases/Pages/sm0092.aspx.

¶ 1(d) (emphasis added). The Security Council's sanctions regime, moreover, expressly states that an "entity" may be sanctioned for "participating in the financing" of the specified terrorist organizations, *see, e.g.*, S.C. Res. 1989, ¶ 4(a), and the Security Council has sanctioned, *inter alia*, an Illinois corporation, *see* p. 10, *supra*.[11]

There is thus widespread global agreement that all those who make it possible for terrorists to obtain funds—individuals and corporate actors alike—should be held accountable. There is likewise an international consensus that each Nation should hold the financiers of terrorism accountable for their support to global acts

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[11] Entities can be liable not only for directly providing funds, but also for acting as accomplices to those who finance terrorist acts. *See, e.g.*, Terrorist Financing Convention, art. 2(5)(a) (defining "[p]articipat[ion] as an accomplice" as an offense). The courts of appeals are similarly in agreement that aiding and abetting liability is available under the Alien Tort Statute, although they disagree as to the required *mens rea*. *See, e.g.*, *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (holding that aiding and abetting liability is cognizable under the Alien Tort Statute if the defendant acted with the purpose to facilitate the violation); *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 400-01 (4th Cir. 2011) (same); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 35 (D.C. Cir. 2011) (requiring only knowledge of the violation for accomplice liability), *vacated and remanded on other grounds in light of Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013); *Doe v. Nestle USA, Inc.*, 766 F.3d 1013, 1024 (9th Cir. 2014) (accepting accomplice liability but declining to decide whether it required shared purpose or only knowledge). To deny corporate liability would, as a practical matter, eliminate accomplice liability altogether, contrary to the clear global consensus that all actors involved in knowing financial support of terrorist acts should be held responsible.

of terrorism, wherever the terrorist acts occurs, and independent of the victims' nationality. The law of nations provides no basis for holding that juridical entities (whether banks or charities) should escape liability solely because of their corporate form.

B. Congress Has Recognized the International Imperative to Prohibit Terrorist Financing and the Role of the Alien Tort Statute as a Counterterrorism Measure.

In the 1990s, at the same time that the United States was leading international initiatives to curb terrorist financing through negotiation of the Terrorist Financing Convention and other international agreements, Congress began creating and expanding civil and criminal liability for entities that provide financial support to terrorism. The legislative history of these enactments shows that Congress recognized that knowing financial support to terrorism—including the provision of financial services by corporations—violated international law, and that the ATS provided the basis for aliens harmed by such acts to hold the responsible entities civilly liable in the courts of the United States.

In 1992, Congress enacted the Anti-Terrorism Act (ATA), which provides that any "national of the United States injured . . . by reason of an act of international terrorism" may sue for damages. 18 U.S.C. § 2333(a). International terrorism is defined as "activities that," among other requirements, "involve violent acts or acts

dangerous to human life that are a violation of the criminal laws of the United States." *Id.* § 2331(1)(a). Providing funds or financial services to terrorists is an "act dangerous to human life." *Boim v. Holy Land Found. For Relief & Dev.*, 549 F.3d 685, 690 (7th Cir. 2008) (en banc) ("Giving money to Hamas, like giving a loaded gun to a child (which also is not a violent act), is an 'act dangerous to human life.'"); *Linde v. Arab Bank PLC*, 97 F. Supp. 3d 287, 323 (E.D.N.Y. 2015) (holding, in the ATA case involving Respondent, that providing financial services to a terrorist organization "is an act 'dangerous to human life'" because "financial services increase Hamas' ability to carry out attacks in the same way" as monetary donations). Corporate entities are subject to liability under the ATA. 18 U.S.C. § 2331(3).

Congress passed the ATA with knowledge that it was filling a gap, because only American citizens then lacked tort remedies to compensate them for the harms caused by terrorist attacks abroad. *See Antiterrorism Act of 1990: Hearing on S. 2465 Before the Subcomm. on Courts & Admin. Practice of the S. Comm. on the Judiciary*, 101st Cong. 1, 85 (1990) (statement of Joseph A. Morris, former General Counsel, U.S. Information Agency). The legislative history reflects Congress's recognition that aliens, in contrast, already had a remedy "against the more egregious abuses of terrorism" under the ATS, which "would be preserved." *Id.* at 90.

When Congress later enacted legislation criminally prohibiting material support to designated terrorist organizations, Congress expressly tied the statute's content to the law of nations, stating that "Congress may by law impose penalties relating to the provision of material support to foreign organizations engaged in terrorist activity" because "the Constitution confers upon Congress the power to punish crimes against the law of nations." Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 301(a)(2), 110 Stat. 1214, 1247 (1996). This criminal law bars "provid[ing] material support or resources" to designated terrorist organizations. 18 U.S.C. § 2339B; *see also id.* § 2339A (prohibiting material support knowing the resources will be used for specified criminal terrorist acts). The grounding of this prohibition in Congress's law of nations authority further confirms that the ATS encompasses a remedy against corporations that knowingly provide funding or financial services to terrorist organizations. The term "material support or resources" includes "any property, tangible or intangible, or service, including . . . financial services." *Id.* § 2339A(b)(1). And entities, as well as individuals, have been convicted under this prohibition. *See, e.g.*, *United States v. El-Mezain*, 664 F.3d 467, 483 (5th Cir. 2011) (describing the criminal conviction of Holy Land Foundation, a corporate entity).

These enactments demonstrate that Congress has long understood the law of nations to prohibit corporate financial support for terrorism. Consistent with

the United States' position abroad, Congress has recognized that the ATS is a critical part of the domestic law and legal framework that deters the use of U.S. financial markets and systems to fund terrorism. Eliminating the ATS remedy against corporations would be inconsistent with international and domestic efforts to suppress terrorist financing by *any* actor and would leave a critical gap in the U.S. enforcement and deterrence matrix.

II. Civil Liability For Entities That Provide Funds Or Financial Services To Terrorist Groups Is Essential To Defeating Terrorism.

The agreements and enactments described above establish that there is a comprehensive international legal regime that seeks to identify, isolate, and penalize persons and entities that knowingly provide financing—through the collection of funds or provision of financial services—to terrorists. The success of this effort depends upon each nation undertaking every possible domestic enforcement measure to root out such financial support within its territory. Here, that includes imposing civil liability under the ATS on corporations that knowingly provide financial support to terrorists. Such liability forms the backdrop against which U.S. domestic law has developed and provides a critical tool for preventing terrorist attacks by deterring the use of U.S. funds and U.S. financial systems to fund terrorism. Reaffirming that the ATS allows U.S. courts to hold corporations liable for financing terrorism can

ultimately save the lives of innocents, including American citizens.

A. Civil Liability Is a Critical Tool for Global Counterterrorism Efforts.

1. Criminal and administrative enforcement alone cannot stem the tide of funds flowing to terrorist groups. Civil tort actions "provide an invaluable supplement to the criminal justice process and administrative blocking orders." JIMMY GURULÉ, UNFUNDING TERROR: THE LEGAL RESPONSE TO THE FINANCING OF GLOBAL TERRORISM 324 (2008).

Although the costs of any particular attack may be low, major terrorist organizations require large budgets to function. Michael Freeman, *The Sources of Terrorist Funding: Theory and Typology*, 34 STUDIES IN CONFLICT & TERRORISM 461, 462 (2011). They raise money to cover the costs of, among other things, recruiting new members, communications, fake documents, weapons, bribes, and, as was the case here, *see* p. 27, *infra*, stipends to the families of dead terrorists, including suicide bombers. *Id.* It is estimated that Al-Qaida had a budget of $30 million per year at one time, that Hezbollah's annual budget was between $100 and $200 million in 2005, and that insurgent groups in Iraq collectively raised between $70 million and $200 million in 2006. *Id.*

Government enforcement alone is not enough to stanch the flow of funds. Through the end of 2015, the United States had frozen about $37 million in assets,

and in 2005, the United States estimated that $147 million had been frozen worldwide, including in the United States.[12] In *amici's* view, founded on collective experience with public enforcement, the fight against financing terrorism requires private enforcement mechanisms as a necessary complement to public efforts. All resources must be brought to bear to combat this global threat to peace and security.

Civil liability is a critical adjunct to government enforcement efforts for several reasons. Advantages of civil actions include a lower burden of proof than in a criminal prosecution, no requirement of jury unanimity, and sometimes more liberal discovery rules and procedures. GURULÉ, at 325. The civil discovery process, in particular, is important; mapping and identifying the complicated financial relationships that undergird payments for terrorist activities requires substantial effort.

Most fundamentally, civil liability helps achieve maximum deterrence in a context where every dollar deterred or disrupted from flowing to terrorist activities helps prevent attacks and therefore saves lives. "While the prospect of large civil monetary judgments may have little or no deterrent value for radical

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[12] OFFICE OF FOREIGN ASSETS CONTROL, DEP'T OF TREASURY, TERRORIST ASSET REPORT: CALENDAR YEAR 2015 8 (2016), *available at* https://www.treasury.gov/resource-center/sanctions/Programs/Documents/tar2015.pdf; Thomas J. Biersteker, Sue E. Eckert & Peter Romaniuk, *International initiatives to combat the financing of terrorism*, *in* COUNTERING THE FINANCING OF TERRORISM 234, 245 (Bierstecker & Eckert eds., 2008).

jihadists, the same may not be true of individual donors, charitable organizations and financial institutions that lend financial support or direction to foreign terrorist organizations." GURULÉ, at 324. Civil judgments are often substantially larger than available administrative penalties, and the litigation itself is costly. For example, the civil penalty imposed against Respondent for violations of the Bank Secrecy Act based on its failure to "manage the risks of money laundering and terrorist financing in connection with United States dollar clearing transactions" was $24 million. Financial Crimes Enforcement Network, Dep't of Treasury, FinCEN and OCC Assess $24 Million Penalty against Arab Bank Branch (Aug. 17, 2005).[13] The amount of the civil damages Respondent is likely to pay in the ATA case (where treble damages are authorized) is orders of magnitude larger: Respondent has announced that it has set aside $1 billion to cover its expected obligations under a settlement agreement. *Arab Bank settlement over militant attacks tied to U.S. appeal*, REUTERS, May 25, 2016.[14]

The availability of civil damages for all victims of terrorist attacks—not just Americans—ratchets up the deterrence capacity of civil suits. Imposing civil liability on entities that knowingly provide funds and financial services to terrorists achieves the same objectives as the U.S. designation regime: it deters donations or

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[13] *Available at* https://www.fincen.gov/news/news-releases/fincen-and-occ-assess-24-million-penalty-against-arab-bank-branch.

[14] *Available at* http://www.reuters.com/article/arab-bank-settlement-idUSL2N18M0BJ.

contributions to entities found liable, disrupts terrorist financing, heightens public awareness of the connection of those entities to terrorism, and, at bottom, "[e]ncourages [those] entities to get out of the terrorism business." Dep't of State, Executive Order 13224.[15]

Civil liability achieves those objectives, moreover, without making demands on an already-strained public fisc. In the experience of *amici*, government resources are not, alone, enough to deter and defeat terrorist funding. What's more, "the government will likely prioritize its resources, focusing on the actual perpetrators of terrorist acts." GURULÉ, at 325. And beyond providing additional resources to deter violators that the government may not pursue, private efforts to track down and identify these financial networks can help stimulate government efforts. Indeed, the audit that led to the government-imposed civil penalty for Respondent discussed above was triggered by this civil suit. *Id.* at 166.

Enlisting as "private attorneys general" those who have suffered harm at the hands of terrorists and terrorist financiers is, in sum, crucial to ensuring maximum identification of wrongdoing, maximum deterrence, and maximum enforcement—thus preventing the most terrorist attacks and saving the most lives. When public enforcement "prove[s] difficult . . . the Nation . . . ha[s] to rely in part upon private litigation as a means of securing broad compliance with the law." *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 401

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[15] *Available at* https://www.state.gov/j/ct/rls/other/des/122570.htm.

(1968); *see also Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987) (describing how RICO and the Clayton Act "bring to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate"); *see also generally* William B. Rubenstein, *On What A "Private Attorney General" Is—And Why It Matters*, 47 VAND. L. REV. 2129 (2004).

2. But civil liability can serve as a maximally effective tool to combat the provision of financial support to terrorists—and thereby, to help prevent terrorist acts—only if it is available against corporate entities, as well as individuals. Entities—including charities, businesses, and banks—are far more likely than individuals to have assets in the United States that could be put at risk by a judgment under the ATS, making it "unprofitable to provide financial assistance to terrorist groups" or potentially even "bankrupting them and putting them out of business." GURULÉ, at 324.

The role of juridical entities—taking the form of corporations, limited liability companies, or other similar forms—in channeling funds to terrorist organizations and facilitating terrorist payments cannot be overstated. Among other sources, such as state sponsors, terrorist financing depends upon businesses, banks, and "nominally humanitarian organizations." Matthew A. Levitt, *The Political Economy of Middle East Terrorism*, MIDDLE EAST REV. OF INTL. AFFAIRS, Dec. 2002, at 49, 51. If only individuals could be held civilly liable and not juridical entities, large swathes of the terrorist financing network would remain immune

from suit, and the few major players that are now individuals could immunize themselves merely by incorporating.

Charities, in particular, play a crucial role in terrorist financial networks. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 30 (2010) ("[T]errorist groups systematically conceal their activities behind charitable, social, and political fronts."). As of 2008, the Treasury Department had designated over forty charities as Specially Designated Global Terrorists under Executive Order 13224. GURULÉ, at 118. The amount of money raised through nominally charitable organizations can be staggering; the Taliban receive an estimated $150-$200 million per year from charities in the Gulf countries. Freeman, at 470. Charities also offer terrorist organizations the benefit of global fundraising, including fundraising in the United States. It is estimated that one-third of Hamas' multi-million-dollar annual budget comes from charities in North America and Western Europe, GURULÉ, at 117, and in a six-year period, the Holy Land Foundation sent over $12 million to Hamas, *El-Mezain*, 664 F.3d at 486-87.

Terrorists also "move money through trusts," because "the true or 'beneficial' owners, as well as the recipients of the funds (including terrorist organizations), can be hidden beneath layers of corporate identities." Shima Baradaran, et al., *Funding Terror*, 162 U. PA. L. REV. 477, 491 (2014). Purportedly legitimate businesses—which may take a corporate form—are an additional source of funds. *See, e.g.*, Freeman, at 469 ("Terrorist groups do not just engage in criminal

activity; they often operate totally legal businesses for a profit."); Levitt, at 51 ("Investigation into al-Qa'ida sleeper cells in Europe in the wake of September 11 revealed the widespread use of legitimate businesses . . . to derive income to support . . . their activities."). Consistent with these recognized sources of funding, the list of Specially Designated Global Terrorists in the United States includes many non-profit charitable corporations, trusts, and corporations and limited liability companies with purportedly legitimate business purposes. *See* p. 12, *supra*. There is no good reason to hold such entities—that international law already recognizes as capable of violating the law of nations for their acts—immune from ATS liability.

And when it comes time for terrorist groups to move money from their funding sources to accounts they can draw upon to purchase weapons, make incentive payments to the families of suicide bombers, or otherwise fund their attacks, terrorists, like the rest of us, often use corporations to do so—*i.e.*, banks. "Contrary to popular belief, terrorists use banks and other financial institutions to transfer funds." GURULÉ, at 151. Wire transfers are a fast way to move money across vast distances, and the large daily volume of legitimate electronic fund transfers makes illegitimate payments more difficult to identify. *Id.* It perhaps goes without saying that wire transfers are much more effective "than attempting to smuggle bulk cash across international borders," *id.*—but they serve the same function. For that reason, "wire transfers involving

cash deposits and withdrawals [are] a primary technique for moving terrorist funds." FATF, GLOBAL MONEY LAUNDERING & TERRORIST THREAT ASSESSMENT 24 (2010).[16]

Many banks, of course, attempt to ensure that they are not processing terrorist payments. But others—as the jury found in the ATA companion to this case—knowingly process payments on behalf of terrorist organizations, including payments for the families of suicide bombers. *See, e.g.*, *Linde*, 97 F. Supp. 3d at 304-05 (describing a letter from Respondent's correspondent bank in Saudi Arabia supplying lists of payments requested from the New York branch by the Saudi Committee for Support of the Intifada Al Quds to the families of individuals whose cause of death was noted as "martyrdom operations"); *Licci v. Lebanese Canadian Bank*, 834 F.3d 201, 219 (2d Cir. 2016) (dismissing ATS suit due to circuit precedent foreclosing corporate liability where plaintiffs alleged the bank knowingly processed dozens of international wire transfers on behalf of the Shahid (Martyrs) Foundation, an arm of Hezbollah, through its correspondent bank in New York); Levitt, at 52-53 (describing how Arab Bank and Bank al-Taqwa have been used to fund terrorist activities).

Because corporate entities, including charities, are often a primary source for collecting money, and corporate entities, including banks, are often the primary

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[16] *Available at* http://www.fatf-gafi.org/media/fatf/documents/reports/Global%20Threat%20assessment.pdf.

mechanism for moving money, immunizing corporations from civil liability under the ATS would substantially undercut—if not effectively eliminate—the use of civil liability to deter terrorist financing for terrorist attacks overseas, including for funding and financial services provided *within the United States*. The facts here provide a paradigmatic example; as the jury found in the companion ATA case, Respondent used its office in New York and the benefits of transacting in dollars to knowingly make "payments to beneficiaries identified by Hamas-controlled organizations, including the families of Hamas suicide bombers and prisoners," among other financial services. *Linde*, 97 F. Supp. 3d at 299. Corporate liability under the ATS for that misconduct—which violates international law—is, in *amici*'s opinion, essential to the success of domestic counterterrorism efforts, and allows the United States to live up to its international obligations to leave no stone unturned in the effort to "suppress the financing of terrorist acts." S.C. Res. 1373 ¶ 1(a).

B. Allowing Non-American Victims of Terrorism to Obtain Redress in U.S. Courts for Corporate Financial Support to Terrorists Aids Global Cooperation Against Terrorist Financing.

1. Just as eliminating corporate liability would substantially undercut the effectiveness of critical counterterrorism measures, so would permitting only American nationals to obtain redress in the United States for corporate violations. That would be the

practical effect of holding that there is no liability under the ATS for the kind of knowing support to terrorism at issue here. In the opinion of *amici*, the United States has a strong and fundamental interest in depriving terrorist organizations of the use of American financial and banking systems to support *any* terrorist attacks—whether or not Americans are the direct victims of such attacks.

Terrorism is a global scourge, which must be addressed from a global perspective. The ability to deter the use of American money, assets, and financial services to fund terrorist attacks should not turn upon the happenstance of the victim's nationality. And Congress recognized as much enacting the ATA as a complement to the Alien Tort Statute. *See* p. 17, *supra*. The full brunt of deterrent force should be brought to bear on all such financing, whoever the victim, that "touch[es] and concern[s]" the United States. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

Even when no American citizens are directly injured in a particular terrorist attack abroad, the financing of that activity touches and concerns the United States in a number of ways. Such attacks destabilize the nation or region in which they occur, increase the ability of terrorist networks to recruit people and funds, and harm U.S. allies, all of which harms core U.S. national security interests and degrades the global counterterrorist effort critical to U.S. security at home and abroad. As the Security Council has stated, any act of terrorism is a "threat to international peace and security." S.C. Res. 1368, ¶ 1. In other

words, a terrorist attack in any nation harms all nations.

And in this ever-smaller world, just because one attack happened not to harm Americans, it does not mean that Americans will be immune from the next one, which may occur anywhere in the world. Instead, successful attacks breed more attacks, which may strike Americans in the future. A central tenet of the U.S. counterterrorist effort is to deny terrorist groups freedom of maneuver and safe haven abroad in order to protect Americans at home and abroad. The same principle applies to efforts to root out terrorist funding networks. Civil liability to remedy harm to non-Americans abroad is critical to achieving maximum deterrence of financial support to terrorist activities and thereby preventing more attacks and saving more lives—including American lives.

Immunizing corporations from suit for financial support that helps terrorist organizations conduct attacks abroad is all the worse when, as here, the financial support is provided through the U.S. financial system. The United States' failure to penalize such financing harms its allies and therefore undermines fundamental U.S. interests. *See Humanitarian Law Project*, 561 U.S. at 32 ("Providing foreign terrorist groups with material support in any form also furthers terrorism by straining the United States' relationships with its allies and undermining cooperative efforts between nations to prevent terrorist attacks."). A corporation that "has earned profits by abuse of fundamental human rights," *i.e.*, by providing financial

services to terrorist activities, should not be "free to retain those profits without liability." *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 151 (2d Cir. 2010) (Leval, J., concurring in judgment). To read the ATS to permit such immunity from liability is not consistent with international law and would severely prejudice U.S. efforts to suppress and shut down all financial support to terrorism within its territory.

2. Shielding corporations from liability for providing funds and financial services to terrorist groups does more than inflict direct damage to U.S. counterterrorism efforts. Corporate immunity within the United States would also likely result in other nations curtailing their efforts to shut down terrorist financing. International cooperation is critical to defeating terrorism, *see Humanitarian Law Project*, 561 U.S. at 32 ("We see no reason to question Congress's finding that 'international cooperation is required for an effective response to terrorism.'"). Such cooperation with our allies is particularly crucial to shutting down terrorist financing because money so easily flows globally through the financial systems that have the weakest anti-money-laundering and counterterrorist protocols in place. *See* Levitt, at 59 ("Targeting a wide array of groups and organizations funding and transferring terrorist funds is critical, but must be conducted as part of a well-coordinated international effort.").

The United States has been a leader in the efforts to disrupt terrorist financing, and has been able to secure agreement and cooperation from other nations to

take a harder line on terrorist financing in part because the United States has made every effort to root out any financial support to terrorist activity within its borders. Immunizing corporations from liability for financial support to terrorism provided through the U.S. banking system because that financing happened to result in the deaths of only non-Americans would not live up to the spirit of the United States' international obligations. The cooperation among nations in designating organizations as terrorist actors has been hard fought and rests upon the recognition that entities, including banks and charities, violate the law of nations when they fund terrorism. A judgment that entities are not subject to liability under the ATS—even if they are known financiers of terrorism—would disturb that global understanding, and make it more difficult for the United States to convince other nations to take the hard, unpopular measures that may be required to shut down terrorist financing—such as penalizing charities.

Ultimately, if banks and other corporate entities cannot be held accountable in U.S. courts for financial support and services they provided to terrorists, it only makes it easier for the terrorists—easier for them to move money through U.S. banks, easier for them to benefit from dollar-denominated payments, and easier for them to pay for and conduct attacks. There is no warrant in the law of nations for the ATS to shield corporate entities from liability for such conduct, when detailed international agreements hold them liable. Because terrorist financiers violate the law of nations,

whatever their legal form, they belong in the small class of enemies of mankind against whom the Founders aimed to provide redress in the courts of this Nation under the ATS. American courts should fulfill the role the Founders envisioned of holding those who violate the law of nations, including corporations, accountable for such misconduct.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be reversed.

Respectfully submitted.

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APPENDIX

The *amici curiae* joining this brief include:

Daniel Benjamin – Ambassador Benjamin served as Ambassador-at-Large and Coordinator for Counterterrorism during the Obama Administration from 2009-2012 and was the principal advisor to Secretary of State Hillary Clinton on counterterrorism issues. He also served as the Director for Transnational Threats on the National Security Council, after serving as the Special Assistant to the President for National Security Affairs, under President Clinton. He is currently the Norman E. McCulloch Director of the John Sloan Dickey Center for International Understanding at Dartmouth College and Professor of the Practice of Diplomacy in the Dartmouth Government Department.

Rosa Brooks – Professor Brooks is a member of the faculty at Georgetown University Law Center, where she also serves as Associate Dean for Graduate Programs. From 2009 to 2011, she served as Counselor to the Under Secretary of Defense for Policy, and in 2010 she also became Special Coordinator for Rule of Law and Humanitarian Policy. Professor Brooks is also a columnist and contributing editor for Foreign Policy and a senior fellow at Foreign Policy.

Joshua A. Geltzer – Dr. Geltzer is a Visiting Professor of Law at Georgetown University Law Center and a fellow in New America's International Security Program. He served from 2015 to 2017 as senior director for counterterrorism at the National Security Council, having served previously as deputy legal advisor to the

National Security Council and as counsel to the assistant attorney general for national security at the Department of Justice. Dr. Geltzer received a Ph.D. in War Studies from King's College London, where his research focused on American counterterrorism strategy toward al-Qaida, and a J.D. from Yale Law School.

Mary Beth Goodman – Ms. Goodman was the Special Assistant to President Obama and Senior Director for Development and Democracy at the National Security Council, where she was responsible for advising the President and National Security Advisor on global development, health, democracy and humanitarian issues. She previously worked at the NSC as the Director for International Economic Affairs working on developing policies related to economic governance and assistance for the Middle East and North Africa in response to the Arab Spring. Prior to that, Ms. Goodman worked for the Departments of State and Homeland Security, including in a variety of overseas postings. She also served as a Senior Fellow at the Center for American Progress, and co-founded The Sentry, a civil society initiative to investigate the connection between kleptocracy, corruption and human rights abuses in Africa. She is a member of the Council on Foreign Relations.

Jimmy Gurulé – Professor Gurulé is a tenured member of the law faculty at Notre Dame Law School, where he teaches courses in Criminal Law, International Criminal Law, the Law of Terrorism, and National Security Law. Professor Gurulé served as Under Secretary (Enforcement) at the U.S. Department of

the Treasury, from 2001-2003. In this capacity, he played a central role in developing and implementing the U.S. Government's counterterrorist financing strategy. He also served as Assistant Attorney General from 1990-1992 during the administration of President George H.W. Bush. He has published numerous books and articles on counterterrorism law and legal strategies for combating the financing of global terrorism.

Dennis M. Lormel – Mr. Lormel is an international expert addressing terrorist financing, money laundering, fraud, and financial crimes. He amassed extensive major case experience in the FBI while working there from 1976 through 2003, as a street agent, supervisor and senior executive, particularly in complex finance-related crimes. In response to the terrorist attacks of September 11, 2001, Mr. Lormel assumed responsibility for establishing, coordinating and directing the FBI's comprehensive terrorist financing initiative, serving as Chief of the Terrorist Financing Operations Section, in the Counterterrorism Division. Mr. Lormel is a member of the Advisory Board of the Association of Certified Anti-Money Laundering Specialists.

Mary B. McCord – Ms. McCord served as acting assistant attorney general in charge of the National Security Division of the Department of Justice from October 2016 until April 2017, and as principal deputy assistant attorney general of that Division from May 2014 to April 2017. The National Security Division's responsibilities include handling counterterrorism and

counterespionage prosecutions for the federal government in United States District Courts and practicing before the Foreign Intelligence Surveillance Court. Ms. McCord came to the National Security Division after decades of public service as a prosecutor in the U.S. Attorney's office for the District of Columbia. She will begin an appointment as a visiting professor of law at Georgetown University Law Center on July 1, 2017.

David Pressman – Ambassador Pressman was the U.S. Ambassador to the United Nations for Special Political Affairs, representing the United States on the Security Council during the administration of President Obama. He has served as the senior U.S. negotiator on international disputes around the world. He has also served on the senior leadership team of the Department of Homeland Security and the staff of the National Security Council. Ambassador Pressman is presently a partner in the New York City Office of Boies Schiller Flexner where his practice focuses on complex international disputes, litigation, and white collar defense.

Dennis B. Ross – For more than twelve years, Ambassador Ross played a leading role in shaping U.S. involvement in the Middle East peace process and dealing directly with the parties in negotiations. Ambassador Ross was the U.S. point man on the peace process in both the George H. W. Bush and Bill Clinton administrations. He was instrumental in assisting Israelis and Palestinians to reach the 1995 Interim Agreement; he also successfully brokered the 1997 Hebron Accord and facilitated the 1994 Israel-Jordan

peace treaty. Ambassador Ross is currently counselor and William Davidson Distinguished Fellow at The Washington Institute for Near East Policy. Before rejoining the Institute in 2011, he served for two years as special assistant to President Obama and the National Security Council senior director for the Central Region, and a year as special advisor to Secretary of State Hillary Rodham Clinton.

Mark D. Wallace – Ambassador Wallace serves as the Chief Executive Officer of the Counter Extremist Project (CEP). He served previously as United States Ambassador to the United Nations, Representative for U.N. Management and Reform, from 2005 to 2008. While at the United Nations, Ambassador Wallace launched the U.N. Transparency and Accountability Initiative. Government positions before his service at the United Nations included roles in the Department of Homeland Security and the Federal Emergency Management Agency, where he served as counsel to the FEMA-led recovery effort in the aftermath of the September 11, 2011 terrorist attacks.

William F. Wechsler – Mr. Wechsler's most recent government position was his service in the administration of President Obama as deputy assistant secretary of defense for special operations and combating terrorism, where his work had an emphasis on counterterrorism, counterinsurgency, and information operations. During the Clinton administration, Mr. Wechsler served as special advisor to the secretary of the Treasury, where he helped to establish the legal regime and policy processes that the United States now uses to

impose sanctions and combat money laundering. Before that, he was director for transnational threats on the staff of the National Security Council.

Jonathan Winer – Mr. Winer's most recent government service was as the State Department's Special Envoy for Libya. In addition, Mr. Winer has over 25 years of anti-money-laundering experience. He was previously U.S. deputy assistant secretary of state for international law enforcement, where he was one of the architects of U.S. international policies and strategies on promoting and harmonizing financial transparency, as well as on cross-border law enforcement issues, including money laundering.

Lee Wolosky – Mr. Wolosky is the former U.S. Special Envoy for Guantanamo Closure. He has served under the last three Presidents in significant national security positions, and was awarded the personal rank of ambassador by President Obama in 2016. Mr. Wolosky served as Director for Transnational Threats on the National Security Council under Presidents Clinton and George W. Bush. In this capacity, he had specific responsibility for coordinating U.S. policy relating to illicit finance impacting national security. Mr. Wolosky is a partner in the New York City Office of Boies Schiller Flexner. He is a life member of the Council on Foreign Relations, and a founder and member of the board of directors of the National Security Network.